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In The

Supreme Court of the United States

October Term, 1990

EASTERN AIRLINES, INC.,

Petitioner,

v.

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS

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STATEMENT OF THE CASE

Eastern's statement of the case is accurate. Unfortunately, its subsequent argument – which asserts that the Eleventh Circuit's opinion "has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation" – is hyperbolic in the extreme (Petitioner's brief, p. 34). The opinion does no such thing, and we deem it prudent to emphasize an

aspect of the case briefly to ensure that the Court is not misled by the petitioner's rhetorical excesses.

The flight in question departed Miami International Airport on May 5, 1983, bound for Nassau, in the Bahamas. En route to Nassau, one of the airplane's three jet engines lost oil pressure, and it was shut down by the flight crew. The airplane was turned around to return to Miami. Shortly thereafter, oil pressure was lost on the second and third engines, and those engines failed. Without power, the airplane began losing altitude rapidly, and the passengers were told that the airplane would be ditched in the Atlantic Ocean. Understandably, the engine failures and the announcement of the impending crash landing caused a considerable amount of mental distress among the passengers. Fortunately, after an extended period of descending flight without power, the flight crew was able to restart the engine which had initially been shut down, and land the airplane safely at Miami International Airport before that third engine failed.

Following the incident, it was discovered that, during routine maintenance on each engine prior to flight, Eastern's maintenance personnel had failed to install a required "O-ring" to seal against oil leaks. The result was that oil in the engines had been pumped overboard through the gaps left by the omitted O-rings. It was also discovered that Eastern had experienced no less than a dozen prior engine failures for the identical reason, but that Eastern had done nothing to educate its maintenance personnel or otherwise correct this oft-repeated life-threatening omission. The incident was clearly an "accident" within the meaning of that term in Article 17 of the

Warsaw Convention, and the passengers' mental distress was both genuine and severe. At least two of the passengers suffered physical injury from their mental distress.

All of these things were alleged in the several amended complaints (*see* Joint Appendix, 3-9) – and because Eastern obtained a "judgment on the pleadings", all of these things must be accepted as true at this point in the proceedings.[1] There is therefore no basis

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[1] It is also worth noting that the allegations *are* true. In a recent autobiography, Frank Borman, Eastern's president at the time of the incident in suit, publicly conceded the airline's responsibility for the incident:

> . . . I hadn't been satisfied with our maintenance operation, and after a widely publicized incident involving one of our L-1011s – a near-ditching in the Atlantic – I decided changes had to be made. The Tri Star had lost power in all three engines, a multiple malfunction traced to faulty installation of oil rings. There had been sloppy work by inadequately supervised mechanics.
>
> . . . .
>
> I wasn't suprised that Eastern was targeted for an investigation [by the FAA]. The near-ditching incident, plus our known financial difficulties, had made us suspect. Yet, I was confident we had cleaned up our act after that L-1011 embarrassment. Some thought we should have fired the mechanics responsible, but I felt management was partially at fault – we had changed certain engine maintenance procedures without making sure the word had filtered down to the mechanics directly involved. . . .

Frank Borman with Robert J. Serling, *Countdown, An Autobiography*, pp. 409-12 (William Morrow, New York, 1988).

whatsoever for Eastern's suggestion that the plaintiffs' mental injuries are "fictitious or frivolous", or otherwise undeserving of compensation – nor is there any basis for the suggestion that recognizing a cause of action for the redress of those injuries would be "anomalous".

SUMMARY OF ARGUMENT

I. In the interest of brevity, and because we do not believe we can improve on the court of appeals' analysis of the issue in any significant way, we simply adopt Section III of the court of appeals' opinion as our primary argument here. We have three brief additional observations to make. First we note that Eastern's proposed construction of Article 17 necessarily concedes that the phrase "lésion corporelle" *does* authorize a recovery of damages for mental distress in at least some cases. Given that concession, Eastern cannot ask the Court to construe the phrase to exclude *all* damages for mental distress, and it has not. It has asked the Court instead to read the phrase to include damages for mental distress if accompanied by physical impact or injury, and to exclude damages for mental distress if unaccompanied by physical impact or injury. In our judgment, there are not enough words in the phrase "lésion corporelle" to spell out such a complex distinction. The phrase either includes or excludes such a recovery, but it clearly cannot do both. The only logical construction of the phrase which accords with Eastern's concession is that the phrase allows the recovery of damages for mental distress.

Second, we think Eastern has badly overstated the purpose of the "impact rule" and the consequences which will follow from the court of appeals' refusal to read its complexities into the phrase "lésion corporelle". Damages for psychic injury and mental distress are normally recoverable in most tort actions; the "impact rule" is simply an artificial device to sort the significant from the trivial – to prevent, as a matter of judicial policy, inundation of the judiciary with trifling claims. Because this is its purpose, the "impact rule" has been relaxed in numerous types of cases, and the facts of the instant case clearly fall into these exceptional categories, rather than into the category of the trivial. In addition, the type of line-drawing represented by the "impact rule" is unnecessary in this case, because the significant has already been sorted from the trivial by the Warsaw Convention itself. Before there can be a recovery under Article 17, there must have been an "accident", and we take it to be self-evident that an aircraft "accident" is likely to cause genuine and severe mental distress, and that the term itself therefore excludes the type of trivial claims which the "impact rule" is designed to exclude. In short, because the significant has already been sorted from the trivial by Article 17 itself, there is no need for this Court to impose the common law's "impact rule" upon the Warsaw Convention to eliminate trifling claims.

Third, even if the phrase "lésion corporelle" means no more than "bodily injury", we think the phrase "bodily injury" includes both mental and physical injury (as Eastern has conceded it does, at least where the requisite physical impact exists). After all, a mental injury is an injury to the brain, and the brain is certainly an

organ of the body. The current view of the human life form is that anxiety, fear, mental anguish, psychic trauma and the like are physiological reactions to external stimuli – i. e., that a "mental injury" is, in fact, a "bodily injury". A treaty, like a Constitution, is a flexible instrument formulated in broad terms to accommodate the future – and just as the Warsaw Convention can be read flexibly enough to accommodate aviation's growth from ragwing bi-planes to jumbo jets in the 60 years since its adoption, it can be read flexibly enough to accommodate this modern understanding of the nature of mental injury.

II. In the concluding section of its argument, Eastern asks the Court to decide an additional question – whether the Warsaw Convention so entirely preempts the field that it must be considered an "exclusive" remedy, or whether it preempts local law remedies only to the extent that they are inconsistent with it. We do not believe this question is properly before the Court. The question was not one of the "Questions Presented" in Eastern's petition for writ of certiorari. The question was also expressly left open below, so it does not fall within the "plain error" exception to the rule. The advisory opinion which Eastern seeks also asks the Court to resolve a question which is entirely moot at this point, since the Florida Supreme Court has held that the passengers of Flight 855 have no state law causes of action. Given this holding, the preemption issue initially lurking in these cases no longer exists – and there is therefore no controversy over that point which needs to be resolved by this Court. For these three reasons, we do not believe the second question smuggled into Eastern's argument is properly before the Court.

The *reason* why Eastern has requested an advisory opinion on the question is that it hopes to overturn a decision of the Chief Judge of the Southern District of Florida, which currently limits the removal jurisdiction of that court in actions arising out of accidents in international air transportation. *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). This decision holds, in essence, that the Warsaw Convention does not entirely preempt the field, but only preempts local law to the extent that it is inconsistent with it; that a plaintiff may therefore elect to frame his complaint in terms of local law, to which the preemptive "conditions and limits" of the Warsaw Convention can be pled in defense; and that, because of the settled "well-pleaded complaint rule", the availability of the federal defense will not justify removal of the action to federal court.

If, as *Rhymes* holds, the Warsaw Convention does not entirely preempt the field, but only preempts those aspects of local law which are inconsistent with it, then the settled "well-pleaded complaint rule" simply required the conclusion reached in *Rhymes*. This Court has created only one very limited exception (in only two very specific contexts) to that rule – the "complete preemption" doctrine, which holds that if the preemptive force of a federal statute is truly "extraordinary", the statute converts an ordinary state common law complaint into one stating a federal claim for purposes of the "well-pleaded complaint rule". Eastern's contention that the Warsaw Convention is "exclusive" is an attempt to fit the Convention within this infrequently applied exception to the general rule. In our judgment, neither the express language of the Convention nor the plain import of its

legislative history can ever justify a conclusion that the Convention was intended to "entirely preempt" the field.

In the first place, it is clear from the face of the Convention itself that its preemptive effect can only be partial, because the Convention only partially addresses the numerous issues which would necessarily arise in any action to recover damages for death or injury in international air transportation. We will examine the provisions of the Convention which point to this conclusion in some detail in the argument which follows. We will also examine the Minutes of the Convention in some detail, because it is both evident from the Minutes, and sometimes express in them, that the intention of the drafters was *not* to write a document which entirely preempted the field, but to write a document which regulated only certain areas of international air law, leaving all unregulated areas to local law. In the process, we will demonstrate that the Warsaw Convention undeniably stops well short of the "complete preemption" theory upon which Eastern's quarrel with *Rhymes* squarely depends, and we respectfully submit that *Rhymes* was correctly decided.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT ARTICLE 17 OF THE WARSAW CONVENTION PROVIDES A REMEDY FOR PSYCHIC INJURY AND EMOTIONAL DISTRESS UNACCOMPANIED BY PHYSICAL INJURY, WHEN CAUSED BY AN ACCIDENT IN INTERNATIONAL AIR TRANSPORTATION.

It is evident from the court of appeals' opinion that the issue presented here was exhaustively researched,

thoughtfully analyzed, and carefully resolved. The opinion also contains its own thorough rebuttal to the several challenges leveled at it here. We do not believe that we can improve upon it in any significant way – and to spare the Court the need to read our argument twice, we simply adopt Section III of the court of appeals' opinion as our primary argument here. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467-80 (11th Cir. 1989). We will supplement that argument with a brief rebuttal to some points which Eastern has raised for the first time here, and we will close with three brief, additional observations which we believe relevant to consideration of the issue.

Eastern argues that the phrase "lésion corporelle" is "clear and unambiguous". Given the conflict in decisions which may have provoked the grant of certiorari; the scholarly disagreement over the meaning of the phrase (which Eastern has highlighted in its brief); and the fact that, as the court of appeals observed, "[t]he question whether Article 17 encompasses recovery for purely mental injuries has confounded courts and commentators for many years" (*Floyd, supra* at 1471) – we doubt that the Court can comfortably declare the phrase "clear and unambiguous". Eastern also argues that "international standards", rather than French law, were meant to govern interpretation of the Warsaw Convention. The short answer to this argument can be found in *Air France v. Saks*, 470 U.S. 392, 399 (1985), in which the Court held that, to determine the meaning of any given term in Article 17, it "must consider its French legal meaning".

Eastern also argues that the drafters of the Convention used the phrase "lésion corporelle" (or "bodily

injury", in the English translation) when discussing Article 17, and that the discussion therefore supports its construction of Article 17. In our judgment, this argument proves nothing. It is the *meaning* of the phrase which is in issue here, and the fact that the drafters used the phrase itself in discussing the phrase certainly sheds no light on *that* question. Eastern also refers the Court to several secondary authorities for the proposition that the phrase "lésion corporelle" was not originally intended to include claims for purely mental injury. However, the most that these secondary authorities reflect is scholarly disagreement over the intention of the drafters and the meaning of the ambiguous phrase, and sentiment that the ambiguity ought to be resolved in favor of liability for purely mental injury (or that Article 17 should be clarified to make the point certain) – so these authorities add little to Eastern's position here.

Eastern next argues that the court of appeals should not have looked to the 1966 Montreal Agreement or the 1971 Guatemala City Protocol as examples of the "subsequent conduct of the contracting parties". It suggests instead that the more appropriate "subsequent conduct" is that of the earlier 1951 meeting of the ICAO in Madrid, at which the ICAO proposed but did not adopt a revision to Article 17 which would have made the recoverability of damages for mental injury explicit rather than ambiguous. The revisions proposed at the 1951 Madrid conference appear to have been stillborn, however; and because the conference amounted to no more than negative action on interim discussions concerning an ongoing review, the probative value of the discussions to the question presented here can hardly be elevated above the subsequent

positive conduct of the contracting parties represented by the Montreal Agreement and the Guatemala City Protocol. We therefore believe that the court of appeals properly gave more weight to the subsequent positive actions of the contracting parties. The fact also remains that, because of the conduct of the contracting parties which resulted in the Montreal agreement, the respondents in the instant case were provided with a ticket which translated the phrase "lésion corporelle" into the phrase "personal injury". And with that brief rebuttal behind us, we turn to the three additional observations which we promised the Court.

First, we note that, by bottoming its suggested construction of Article 17 exclusively upon the artificial line drawn by the common law's "impact rule", Eastern has necessarily conceded that Article 17 permits recovery of damages for psychic injury and mental distress if accompanied by a physical impact or injury. Eastern has therefore conceded that the two-word phrase in issue here, "lésion corporelle", *does* authorize a recovery of damages for mental distress in at least some cases. Given that concession, Eastern cannot ask the Court to construe the phrase to exclude *all* damages for mental distress, and it has not. It has asked the Court instead to read the phrase to include damages for mental distress if accompanied by physical impact or injury, and to exclude damages for mental distress if unaccompanied by physical impact or injury.

In our judgment, there are not enough words in the phrase "lésion corporelle" to spell out such a complex distinction. The phrase either includes or excludes such a recovery, but it clearly cannot do both. Therefore, even if

the Court should be unpersuaded by the court of appeals' reasoning, it ought to be persuaded that the court nevertheless reached the only result which simple logic will permit. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. ___, 109 S. Ct. 1676, 104 L. Ed.2d 113, 127 (1989) (Court cannot "alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial", but must give it a logical interpretation bottomed upon ordinary rules of construction).

Second, we think Eastern has badly overstated the purpose of the "impact rule" and the consequences which will follow from the court of appeals' refusal to read its complexities into the phrase "lésion corporelle". The common law does not deem all claims for psychic injury and mental distress to be "fictitious or frivolous", as Eastern would have the Court believe. In fact, damages for psychic injury and mental distress are normally recoverable in most tort actions – because, as a matter of human experience, mental injuries are considered every bit as real and significant (and therefore deserving of compensation) as physical injuries. *See Restatement (Second) of Torts*, §905 (1965). *Cf. Restatement (Second) of Torts*, §47, Comment b (1965). The "impact rule", to the extent that it has survived at all in the common law, has a different purpose altogether: it is primarily an artificial device to sort the significant from the trivial – to prevent, as a matter of judicial policy, inundation of the judiciary with trifling claims. *See Restatement (Second) of Torts*, §§46, 436A (1965) (and Comments thereto); Prosser & Keeton, *The Law of Torts*, §54 (5th Ed. 1984).

Because this is its purpose, the "impact rule" has been relaxed in numerous types of cases: where the

defendant, because it is a "common carrier", owed the highest duty of care to the plaintiffs; where the defendant's tortious conduct has been of an aggravated nature; or where the defendant's tortious conduct has been such that genuine psychic injury and mental distress is a predictable consequence of the conduct. *See Restatement (Second) of Torts*, §§46, 47 (1965); Prosser & Keeton, *supra*, §54. The facts of the instant case clearly fall into these exceptional categories, rather than into the category of the trivial. As the court of appeals held below (in a ruling not challenged here), Eastern's conduct – in allowing these *13th*, *14th*, and *15th* engine failures for the same omitted "O-ring" – will support a finding of "wilful misconduct". Eastern is also a common carrier which owes its passengers the highest duty of care recognized in the law. And, of course, it is simply undeniable that the alleged psychic injuries and mental distress of the passengers of Flight 855 are more likely to be genuine than to be feigned. The facts in this case therefore do not commend the type of artificial line-drawing represented by the purely pragmatic policy which initially motivated the common law's "impact rule".

There is also no need for the Court to cleave the phrase "lésion corporelle" into the two complex categories which Eastern purports to find in it to accomplish what the "impact rule" is designed to accomplish, because the significant has already been sorted from the trivial by the Warsaw Convention itself. Before there can be a recovery under Article 17, there must have been an "accident" – defined as "an unexpected or unusual event or happening that is external to the passenger", in contradistinction to "the passenger's own internal reaction to

the usual, normal, and expected operation of the aircraft". *Air France v. Saks*, 470 U.S. 392, 405, 406 (1985). We take it to be self-evident that an aircraft "accident" is likely to cause genuine and severe mental distress, and that the term itself therefore excludes the type of trivial claims which the "impact rule" is designed to exclude – like the rudeness of stewardesses, in-flight turbulence, or any other trivial, mentally aggravating aspect of international air transportation which a passenger should be prepared to expect and accept.

There is therefore no justification whatsoever for the following overstated assertion in Eastern's brief:

> The decision below undermines the Convention's purposes by exposing air carriers to a potentially unlimited number of frivolous and unverifiable claims. Conceivably, every hypersensitive individual with a fear of flying could require an airline to pay on a claim for the discomfort experienced on a flight beset by unavoidable turbulence.
>
> The Eleventh Circuit has created an anomalous cause of action which opens wide the door to a flood of fictitious or frivolous litigation.

(Petitioner's brief, p. 34). Given the threshold requirement of Article 17 that there can be no recovery of any damages without an "accident", this "parade of horribles" will never occur. In short, because the significant has already been sorted from the trivial by Article 17 itself (not to mention the fact that even the significant claims have also been artificially "capped" by an unconscionably low limitation upon damages), there is no need for this Court to impose the common law's "impact rule" upon the Warsaw Convention to eliminate trifling claims.

Third, and finally, even if the phrase "lésion corporelle" means no more than "bodily injury", we think the phrase "bodily injury" includes both mental and physical injury (as Eastern has conceded it does, at least where the requisite physical impact exists). After all, a mental injury is an injury to the brain, and the brain is certainly an organ of the body. There was a time in the not so distant past of human evolution, of course, when the mind and the body were considered to be separate and distinct entities. Modern scientific developments have clearly put that mythic view of our being to rest, however – and, although the precise mechanisms of our thoughts and feelings remain largely uncharted, there is general scientific agreement that the sophisticated mental processes of our brain are, in actuality, mere physiological processes involving electrical charges and chemical reactions. In short, the current view of the human life form is that anxiety, fear, mental anguish, psychic trauma and the like (except where caused by innate physiological abnormality) are physiological reactions to external stimuli – i. e., that a "mental injury" is, in fact, a "bodily injury".

Judge Tyler put the point nicely in *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1250 (S.D.N.Y. 1975), as follows:

> . . . However, "death", "wounding", and "bodily injury" in English or in French can, almost as easily, all be construed to relate to emotional and mental injury.
>
> "Bodily injury" is perhaps particularly significant in this regard because of the vast strides which have been taken relatively recently in the fields of physiology and psychology. It becomes

> increasingly evident that the mind is part of the body. Today, it is commonly recognized that mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma. Therefore, the phrase at issue could easily be construed to comprehend all personal injuries which directly and adversely affect the organic functions of a human being.

Such a construction clearly makes much more contemporary sense than a construction which perpetuates a now thoroughly discredited view of human physiology, and we commend it to the Court as an additional justification for construing the phrase "lésion corporelle" to mean what Eastern has already acknowledged it to mean on the ticket it sold the respondents in these cases: "personal injury" – a broad phrase which clearly subsumes and includes the genuine mental injuries suffered by the respondents.

To Eastern's anticipated reply that the Court's task is to determine what the drafters of the Warsaw Convention meant by the phrase "lésion corporelle" in 1929, we remind the Court simply that it is not chained to discredited scientific and philosophical understandings of that era. A treaty, like a Constitution, is a flexible instrument formulated in broad terms to accommodate the future – and just as the Warsaw Convention can be read flexibly enough to accommodate aviation's growth from ragwing bi-planes to jumbo jets in the 60 years since its adoption, it can be read flexibly enough to accommodate the modern understanding of the nature of mental injuries:

Those called upon to construe a treaty should, in the words of Judge Clark, strive to "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49, 83 S. Ct. 1054, 10 L. Ed.2d 184 (1963). These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787. Justice Holmes's counsel concerning Constitutional construction, set forth in his opinion in *Missouri v. Holland*, 252 U.S. 416, 433, 40 S. Ct. 382, 383, 64 L. Ed. 641 (1920), applies with equal force to the task of treaty interpretations:

> [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions. . . .

It cannot be doubted, therefeore, that the Warsaw Convention now functions to protect the passenger from the many present-day hazards of air travel and also spreads the accident cost of air transportation among all passengers. . . .

We conclude, in sum, that the protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve. . . .

. . . .

> We believe, moreover, that the result we have reached furthers the intent of the Warsaw drafters in a broader sense. The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. Our holding today confirms the framers' belief that the ever-changing needs of the system of civil aviation can be served within the framework they created.

Day v. Trans World Airlines, Inc., 528 F.2d 31, 35-37 (2nd Cir. 1975) (footnotes omitted), *cert. denied*, 429 U.S. 890 (1976). *See Air France v. Saks*, 470 U.S. 392 (1985) (treaties are entitled to liberal construction). If this sentiment is relevant here, and we believe it is, we respectfully submit that even if the phrase "lésion corporelle" means only "bodily injury", as Eastern insists, a mental injury *is* a bodily injury – and Article 17 therefore authorizes a recovery of damage for the genuine injuries undeniably suffered by the respondents in the unforgivable "accident" which is the subject of the instant cases.

II

THE SECOND QUESTION PRESENTED IN THE ARGUMENT SECTION OF THE PETITIONER'S BRIEF IS NOT PROPERLY BEFORE THE COURT. ON THE MERITS, THE WARSAW CONVENTION DOES NOT ENTIRELY PREEMPT THE FIELD; IT PREEMPTS LOCAL LAW REMEDIES ONLY TO THE EXTENT THAT THEY ARE INCONSISTENT WITH IT.

In the concluding section of its argument, Eastern asks the Court to decide an additional question – whether the Warsaw Convention so entirely preempts the field

that it must be considered an "exclusive" remedy, or whether it preempts local law remedies only to the extent that they are inconsistent with it. We do not believe this question is properly before the Court. In the first place, the question was not one of "Questions Presented" in Eastern's petition for writ of certiorari. Rule 14.1(a) states that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court". Rule 24.1(a) states that "the brief may not raise additional questions or change the substance of the questions already presented in [the petition for writ of certiorari]". *See Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ").

There is a limited exception to this rule, for "plain error". That exception is not implicated here, however, because the question was not even decided below. Instead, it was expressly left open:

> Eastern suggests that we hold that the Convention provides the exclusive source of a right of recovery and thus completely preempts state law causes of action in accidents involving international air transportation. At this stage of the case, however, we determine only that the Convention preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention. We decline to speculate further on the issue of whether the Warsaw Convention entirely preempts state law causes of action once it provisions are triggered by an "accident" within the meaning of Article 17. . . .

Floyd, supra at 1482. In short, Eastern has impermissibly asked this Court for an advisory opinion on a point not

even ruled upon below – not the correction of a "plain error".

The advisory opinion which Eastern seeks also asks the Court to resolve a question which is entirely moot at this point. As the court of appeals' opinion observes, whether the respondents in these cases have any causes of action under state law "must await the Supreme Court of Florida's decision on the issue" (in the companion case which was not removed to federal court). *Floyd, supra* at 1490. Subsequent to the court of appeals' opinion, the Florida Supreme Court held that the passengers of Flight 855 had alleged no state law causes of action. *See Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990). Given this holding, the preemption issue initially lurking in these cases no longer exists – and there is therefore no controversy over that point which needs to be resolved by this Court. For all of these reasons, we do not believe the second question smuggled into Eastern's argument is properly before the Court.

Because the question is not properly before the Court, we will address its merits as briefly as possible. Before we reach the merits, however, we should explain the *reason* why Eastern (or more accurately, its insurers) has requested an advisory opinion on the question. The reason for the request is that Eastern hopes to overturn a decision of the Chief Judge of the Southern District of Florida, which currently limits the removal jurisdiction of that court in actions arising out of accidents in international air transportation: *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986). Judge King's opinion speaks nicely for itself on the point placed in issue here:

> The proposition presented by the Defendants in these cases is that the cause of action created by the Convention has preempted the application of state wrongful death statutes for loss occurring during international flights. The Defendants argue that the cause of action created by the Convention is exclusive and that no other cause of action for wrongful death will lie. The Plaintiffs on the other hand argue that the remedy may be exclusive as to limitation on damages allowed by the Convention but that the cause of action is not exclusive and may be based in state law.
>
> A distinction must be drawn between an exclusive remedy and exclusive cause of action. The courts that have addressed the issue have all held that the limitations of the convention have always been the exclusive remedy even when the cause of action was based on state law. The amount of recovery is limited by the terms of the convention. The cause of action on which the recovery is based is not limited by the convention. Both state law and the convention may provide a cause of action. Any recovery, no matter how founded, will be subject to the limitations of the convention. Conflicting provisions of state law will be preempted by the limitations imposed by the convention.
>
> The language of the convention itself implies that the cause of action created by the Convention is not exclusive. The Convention states that "any action for damages *however founded*, can only be brought subject to the conditions and limits set out in this convention." 49 U.S.C. § 1502 note, Art. 24(1) (emphasis added). This provision contemplates the application of the convention limitations to actions founded on a basis other than that of the convention. The convention further allows the suit for damages to be brought in a number of locations.

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principle [sic] place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination. 49 U.S.C. § 1502 note, Art. 28(1).

This language contemplates allowing the plaintiff his choice of forum limited only by the provision cited above.

The applicable case law supports the theory that the Convention is not the exclusive cause of action for recovery for [sic] damages. *Tokio Marine & Fire Ins. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980). "The best explanation for the wording of Article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation." *In Re Mexico City Aircrash, supra* 708 F.2d 400, at 414, n.25.

Faced with an almost identical procedural background the Court, when considering the Korean Airlines tragedy, held a well pleaded complaint based solely on a state law cause of action was not removable to the federal district court under the convention and remanded. *Van Ryn v. Korean Airlines, et al.*, 84-6525, slip op. (C.D. Cal. 1985).

. . . .

There is no question that when a state cause of action is in conflict with the provisions of the Convention the conficting provision of the state action will be preempted by the applicable provisions of the Convention. *Boehringer, supra*.

> The application of California law suggested here necessarily conflicts with the congressional scheme. Neither uniformity or effective limitation of the airlines liability could be achieved if the state law doctrines could be invoked to circumvent the application of the limitation. Accordingly we hold that the California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the conventions limitations on liability.

In Re Aircrash in Bali Indonesia, 684 F.2d 1301, at 1308 (9th Cir. 1982). The Convention being a treaty of the United States is thus afforded supremacy over conflicting state law. *Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920).

A review of the cases leads to the conclusion that the Plaintiff may choose to state his cause of action solely on a state law theory and bring the action in state court subject to the limitations of the Convention. If the state law conflicts with the Convention, the Convention will preempt the portion of the state remedy that is in conflict. Thus there are four types of actions available to the Plaintiff; firstly if diversity is present and the complaint meets the other requirements the Plaintiff may bring his complaint in federal court under 28 U.S.C. § 1332. If the Plaintiff so chooses he may bring a cause of action exclusively under the Warsaw Convention and if he wishes he might attach a state cause of action. This type of case could be brought directly in federal court under 28 U.S.C. § 1331 or in the appropriate state court. Of course, if this type of action was brought in state court it could be properly removed to federal court.

The Plaintiffs in the instant cases have chosen to state their cause of action exclusively under a

state wrongful death statute and have brought the current litigation in state court. The Defendants have petitioned for removal of these causes and have filed answers that plead the limitation provisions of the Warsaw Convention as a defense. The mere pleading of a federal statute or treaty as a defense will not be enough to invoke federal jurisdiction through removal if a federal cause of action does not appear on the face of the well pleaded complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed.2d 420 (1983); *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984); *Salveson v. Western States Bankcard Association*, 731 F.2d 1423 (9th Cir. 1984). "When, as in the case before us, plaintiff presents a state-law claim and defendant counters by arguing that federal law preempts the state law on which Plaintiff relies, the federal claim appears by way of defense. Under the well pleaded complaint rule federal jurisdiction over such a claim is lacking." *Hunter, supra* 746 F.2d 635, at 639-640. If the federal courts were to allow removal whenever a federal defense is raised to a state cause of action, the dockets of the federal bench would become inundated with a flood of state litigation.

There is no question that if the Plaintiff had chosen to he could have plead [sic] a federal cause of action. The Plaintiff made the affirmative choice not to so plead and courts are reluctant to disturb the Plaintiff's chosen forum. The courts have extensively addressed this proposition in the area of forum non-conveniens. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 at 507, 67 S. Ct. 839, at 843, 91 L. Ed. 1055 (1947). "[T]he plaintiff's choice of forum is to be respected unless the balance of

both public and private interests strongly justifies a transfer." *Manu International S. A. v. Avon Products, Inc.*, 641 F.2d 62, at 65, (2d Cir. 1981). *See also, Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984); *Carpenter v. Hall*, 352 F. Supp. 806 (S.D.Tex.1972). Pleading a defense under the Warsaw Convention as the Defendants have done will not lay a proper basis for removal to this Court. Accordingly therefore:

It is ORDERED and ADJUDGED that the several motions for remand be and they are hereby GRANTED. The cases removed to this Court from the state court which based their cause of action exclusively on a state cause of action be and hereby are REMANDED to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida.

636 F. Supp. at 740-42.[2]

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[2] The court of appeals' opinion contains a lengthy footnote purporting to collect two divergent lines of authority on the scope of the preemption effected by the Warsaw Convention. *Floyd, supra* at 1482 n. 33. An examination of the decisions collected in the footnote will reveal that the two lines of authority involve mostly semantic differences rather than substantive differences. Most of the decisions cited in support of the "complete preemption" theory advanced by Eastern here do not really grapple with the issue. Most of them are like *Floyd*, in which it was not really necessary to decide the issue, because either preemption theory produced the same result. And most of them simply conclude that, because of a preemption effected by the Warsaw Convention on the facts of the case, the Convention was "exclusive" – but that is really only a different way of saying what *Rhymes* says, that the Convention preempts all inconsistent provisions of local law.

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If, as *Rhymes* holds, the Warsaw Convention does not entirely preempt the field, but only preempts those aspects of local law which are inconsistent with it, then the settled "well-pleaded complaint rule" simply required the conclusion reached in *Rhymes*. *See, e. g., Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1 (1983); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Gully v. First National Bank*, 299 U.S. 109 (1936).

To this general rule, this Court has created only one very limited exception (in only two very specific contexts) – the "complete preemption" doctrine, which holds that if the preemptive force of a federal statute is truly "extraordinary", the statute "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule". *Caterpillar Inc. v. Williams, supra* at 393. This Court has applied that exception in only two narrow circumstances. *See Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (state law does not exist as an independent source of private rights to enforce collective bargaining contracts); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987) (state contract and tort claims completely preempted by Employee

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Because both approaches ordinarily produce the same result, the distinction between them is a distinction without a difference in most cases. As a practical matter, therefore, the distinction becomes important only in cases like *Rhymes*, where the distinction may be determinative of the removal jurisdiction of the federal courts. It is for that reason that we have elected to argue the issue in the context presented in *Rhymes*.

Retirement Income Security Act). Eastern's contention that the Warsaw Convention is "exclusive" is an attempt to fit the Convention within this infrequently applied exception to the general rule. In our judgment, neither the express language of the Convention nor the plain import of its legislative history supports the contention.

First, it is clear from the face of the Convention itself that its preemptive effect can only be partial, because the Convention only partially addresses the numerous issues which would necessarily arise in any action to recover damages for death or injury in international air transporation. For example, the Convention contains no provisions governing who the plaintiff shall be, for which beneficiaries of a decedent's estate the plaintiff can recover, or what the elements of damage are. All of that is expressly left to local law, subject to the handful of "conditions and limits" otherwise imposed upon local law by the Convention:

> *Article 24*
>
> (1) In the cases covered by Articles 18 and 19 [damage to goods and delay in transportation] any action for damages, *however founded*, can only be brought *subject to the conditions and limits set out in this convention.*
>
> (2) In the cases covered by Article 17 [death and personal injury] *the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit, and what are their respective rights.*

(Emphasis supplied). *See Floyd, supra* at 1485 n. 40 ("Apart from liability limitations contained in Article 22

of the Convention, the issue of the computation of damages generally is governed by local law, except, of course, where such law conflicts with the Convention.").

As Judge King observed in *Rhymes*, this "however founded" language is entirely antithetical to any notion that the Convention "entirely preempts" the field. In addition to the decisions cited in *Rhymes*, *see In Re Hijacking of Pan American World Airways, Inc., Aircraft, etc.*, 729 F. Supp. 17 (S.D.N.Y. 1990). Other provisions of the Convention also demonstrate, clearly and expressly, that the Convention imposes "conditions and limits" upon local law, rather than "entirely preempting" the field.

For example, Article 22 defers the issue of "periodical payments" to "the law of the court to which the case is submitted". Article 25 *waives* all "provisions . . . which exclude or limit" liability if damages caused by "such default . . . as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct". Article 28 provides that all "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted". Article 29 provides that "[t]he method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted". *See Halmos v. Pan American World Airways, Inc.*, 727 F. Supp. 122 (S.D.N.Y. 1989). And, quite apart from these express references to local law, the Convention simply does not speak to numerous questions which must necessarily be decided by reference to local law – issues like agency, *respondeat superior*, contribution, indemnification, evidence, and so on.

In short, an action to redress a death or injury arising out of an accident in international air transporation finds *most* of its substance in local law, and only "conditions and limits" in the Warsaw Convention – so it is impossible that the Convention "entirely preempts" local law. The proof of the pudding is in Article 25, which removes all the "conditions and limits" of the Convention if "wilful misconduct" is proven – because if "wilful misconduct" is proven in any given case, the cause of action will become almost exclusively an action under local law, and the "conditions and limits" of the Convention will become largely irrelevant. For all of these reasons, evident on the face of the Convention itself, it simply cannot be legitimately argued that the Convention so "entirely preempts" the field that all local law is rendered irrelevant – and it should follow that Judge King's conclusion to that effect in *Rhymes* is legally unassailable.

Eastern argues, in essence, that the need for "uniformity" in this area renders the conclusion reached in *Rhymes* indefensible. However, in our judgment at least, this assertion confuses apples and oranges. To the extent that the Warsaw Convention leaves many issues open to local law, *absolute* "uniformity" was clearly not an object of the Convention. To the extent that the Convention addresses particular aspects of the problem, of course, "uniformity" was clearly an object. But the "uniformity" sought was not "uniformity" of *forum*; it was "uniformity" in the "conditions and limits" to be applied by all courts adjudicating cases governed by the Convention – state, federal, or otherwise. And because state courts fully recognize that the "conditions and limits" of the Convention must be applied to actions brought in state court in

which the Convention governs, "uniformity" in the *law* is fully achieved by virtue of the Supremacy Clause, even if the "well-pleaded complaint rule" is fully enforced.

It is also worth noting that Eastern's position, if adopted, will not even ensure uniformity of forum. Article 28 of the Convention gives a plaintiff a choice of up to four different *countries* in which to bring an action, and if the United States is selected, the plaintiff can make a second-round election between invoking the jurisdiction of a federal court or the concurrent jurisdiction of a state court. To allow removal of a well-pleaded state law claim, as Eastern has effectively urged, will simply add a third round of election between options – and the "uniformity" which Eastern seeks will therefore be defeated each and every time a defendant chooses at the third round *not* to remove a well-pleaded state law claim (which, in our experience, is a not infrequent choice). It would even be open to a defendant sued in multiple cases in a state court, or in various state courts, to frustrate "uniformity" for tactical purposes even further – by removing some of the cases and leaving others alone, in an effort to confuse the outcome with as many inconsistent results as it can obtain, or for delay, or for any other tactical reason which might be served by the exercise of such an option.

It is, incidentally, precisely this type of forum-shopping by *defendants* which the "well-pleaded complaint rule" was purposefully designed to *prevent*:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question,

> even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in a state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987).

The third round of forum selection which Eastern has proposed in the name of "uniformity" here clearly runs afoul of this proscription. It also runs afoul of the proposition that "uniformity of forum" is an insufficient motivation, by itself, to justify expanding the statutory jurisdiction of the federal courts. *See Finley v. United States*, 490 U.S. ___, 109 S. Ct. 2003, 104 L. Ed.2d 593 (1989). And the fact that "uniformity" of forum is well nigh impossible to achieve under the Warsaw Convention in any event demonstrates, most respectfully, that "uniformity" is simply not the issue here. The issue here is whether the Warsaw Convention "completely preempts" the field, as Eastern urges – or whether, as *Rhymes* holds,

it only preempts inconsistent local law. As we have demonstrated, the face of the Convention itself is susceptible of only the latter reading.

Eastern has also relied upon several snippets of the Minutes of the Warsaw Convention in purported support of its "complete preemption" argument. These snippets have been taken out of context, however. They relate only to particular provisions under discussion at the time, in which the intention clearly was to preempt particular aspects of local law. On the more general question of whether the Convention was meant to preempt the field entirely, it is both evident from the Minutes, and sometimes express in them, that the intention of the drafters was *not* to write a document which entirely preempted the field, but to write a document which regulated only certain areas of international air law, leaving all unregulated areas to local law. We will have to collect a number of passages from several different places in the Minutes to make this demonstration, so we ask the Court to bear with us. Our references will be to *Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw* (translated by R. Horner and D. Legrez, 1975) (hereinafter simply *"Minutes"*).

The concern that the initial working draft of the Warsaw Convention did not cover the entire field first surfaced at the close of the debate upon proposed substantive amendments to the draft. The following occurred:

> THE PRESIDENT: Sirs, we have finished the general discussion on the amendments of first order, amendments of substance. Mr. Giannini has the floor.

MR. GIANNINI (Italy): Sirs, this morning we have been presented with several amendments: one submitted by the Romanian Delegation, one by the Delegation from the USSR, one by the Swiss Delegation and another by the Yugoslav Delegation.

I believe that all our colleagues will be in agreement with me in saying that these are questions of wording, except for the Yugoslav proposal, while there is one part which touches the very substance of the Convention.

The Yugoslav Delegation is preoccupied with the fact that this convention is the first one that we do, and it declares:

> As regards the Convention, the Yugoslav Delegation considers that in order to facilitate the work of national courts, one should add to said convention an article specifying:
>
> 'In the absence of stipulations in the present Convention the analogous provisions of the Bern International Convention of October 23, 1924, concerning the carriage of travelers and baggage by railroad must be secondarily applicable.'

The consequences of this proposal are enormous, because there are so many problems which are envisaged in the Bern Convention and which are not provided for by our Convention that I think that the subsidiary becomes the principal.

Moreover, there are such divergences between the system of our Convention and the general system of the Bern Convention that one cannot take, as subsidiary, a system which is neither analagous [sic] nor parallel.

This is why I believe that, for the moment at least, we have not yet arrived at a system which

is uniform enough to envisage recourse to this subsidiary system.

I want very much to make this declaration, because I believe myself to be one of the people who is the most occupied with air law, and I believe that I am able to say that the interest of air law is to develop freely, not to be oppressed either by maritime law, by terrestrial law, or by the law of railroads.

I implore our colleagues therefore, not to insist on their proposal, because the two ways of thinking are very different.

I would like to ask the Reporter to give us his opinion.

MR. DE VOS, Reporter: The role of Reporter has never been as easy as in this circumstance. First of all, because Mr. Giannini took the floor for him, in a much better way than he would have done; then – and I'm very happy for it – I was able to discuss the Yugoslav proposal with its authors before the meeting, and I came away with the impression that the Yugoslav Delegation, in the presence of this difficulty in applying two different regimes in two matters, does not insist on its proposal.

MR. SIMOVITCH (Yugoslavia): Sirs, despite all the efforts made here by all, in order to give basic principles for decisions of national courts, one cannot provide for all cases, or specify all the details which can arise in the case of carriage.

It's for this reason that the Yugoslav Delegation, with the goal of aiding national courts, made this proposal which would permit them to take the Bern convention as the basis of their decisions.

The Yugoslav Delegation knows that the application of this railroad convention presents difficulties, inasmuch as this convention is not signed by some nations (England, USSR), but it makes the suggestion for the purpose of aiding the efforts of the Assembly.

THE PRESIDENT: Does someone ask the floor on this question? . . .

I put the Yugoslav proposal to a vote.

(The proposal is rejected.)

Minutes, supra at 134-35.

Immediately after the Yugoslav Delegation's proposal was debated and rejected, the Italian Delegation raised a related problem. It pointed out that the draft of the Convention did not purport to regulate carriage on a "friendly" basis, and suggested that it should – since, "if we say nothing it will doubtless always be a more serious system of liability than that of the Convention". *Minutes, supra* at 135. This proposal was shouted down by the delegates, and the Reporter observed, "We must limit our efforts and I fear, indeed that we cannot enter on this road". *Minutes, supra* at 136. Undaunted, the Italian delegate insisted that local law concerning "friendly" carriage was much harsher than the Convention had proposed for commercial carriage, and he proposed that his suggestion should at least be referred to the drafting committee. *Id.* This proposal was adopted, but it apparently died in the committee, because it is not mentioned again in the Minutes. Thereafter, there was a brief discussion of what law should apply in the "cases of non-execution of the contract of carriage", and there was general agreement that "[i]t's the national law which governs the case". *Minutes,*

supra at 172. Neither of these two exchanges satisfied the Yugoslav Delegation's problem, of course, but both of them demonstrate that it was the general understanding that, in areas not regulated by the Convention, local law would govern.

Given this apparent consensus, the Czechoslovakian Delegation proposed an alternative amendment to satisfy the Yugoslav Delegation's concern. The following occurred:

> MR. DE VOS, Reporter: We have an article proposed by the Czechoslovak Delegation as an additional article:
>
> > In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply.
>
> I want to remark that this was provided for: Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable.
>
> I believe therefore, that this provision would be of no use.
>
> MR. GIANNINI (Italy): It was withdrawn.
>
> MR. DE VOS, Reporter: There were two proposals, one from the Czechoslovak Delegation which consisted in applying national law for cases not provided for by the Convention, and then a proposal of the Yugoslav Delegation which concerned the application of the Bern Convention for cases not provided for by the Convention.
>
> MR. GIANNINI (Italy): Following a suggestion made by the German Delegation we are going to

> propose adopting for the [title of the] Convention: "Convention relating to certain rules for the unification of private aeronautical law".
>
> Given that the title indicates the special character of the Convention, the Czechoslovak Delegation no longer insists on its amendment. As to the proposal of applying secondarily the rules of the Bern Convention, it was withdrawn.
>
> THE PRESIDENT: Consequently, the proposals are withdrawn.
>
> MR. DE VOS, Reporter. There is only the wording proposal, concerning the wording of the title.

Minutes, supra at 176.

That the Convention was not an attempt to cover the entire field, but was only an effort to regulate some aspects of international air travel, was thereafter confirmed by the delegates as follows:

> MR. RIPERT (France): In the name of the French Delegation, I have the honor of presenting the following request:
>
> > The conference,
> >
> > Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,
> >
> > Expresses the wish:
> >
> > That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that

> there be convened subsequently, new conferences which will pursue this work of unification.
>
> . . .
>
> THE PRESIDENT: We are presented with one single proposal: That of the French Delegation. Therefore, I put to a vote the French Delegation's proposal. There is no opposition? . . . The proposal is adopted.

Minutes, supra at 182-83.

When the final draft of the convention was ultimately read for approval, the draft title had been amended to include the word "certain". The following then occurred:

> The first question which was presented to us was that of the drafting of the title. We have adopted the title: Convention for the Unification of Certain Rules Relating to International Carriage by Air".
>
> This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain delegations such as the Czechoslovak Delegation, which asked that the word "Certain" be added.

Minutes, supra at 188. It will be remembered that the Czechoslovakian Delegation had accepted this amendment as an appropriate alternative to its proposed amendment – which had made express the notion that the Convention "does not provide for the entire matter", and that local law should govern all issues not expressly regulated by the Convention. This change in the title to accommodate this concern was thereafter adopted by the convention. *Minutes, supra* at 189.

We are left, then, with a single word in the title to the Convention, the word "Certain", which is meant to convey exactly what *Rhymes* holds – that the Warsaw Convention preempts inconsistent local law only in the areas which it expressly covers, and that it was not intended to preempt the entire field. Perhaps that is a lot to extract from a single word, but when the background which generated that single word is considered, there can be no question that that is precisely what it was intended to convey.

In short and in sum, to disagree with *Rhymes* and read *"complete* preemption" into the Warsaw Convention, the Court would have to disregard the express language of the Convention and the plain import of its legislative history. This Court has recently made it clear that it can do neither. *See Chan v. Korean Airlines, Ltd*, 490 U.S. ___, 109 S. Ct. 1676, 104 L. Ed.2d 113 (1989). Because the Warsaw Convention undeniably stops well short of the "complete preemption" theory upon which Eastern's quarrel with *Rhymes* depends, we respectfully submit that *Rhymes* was correctly decided.

CONCLUSION

It is respectfully submitted that the court of appeals' decision should be affirmed.

Respectfully submitted,

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